United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

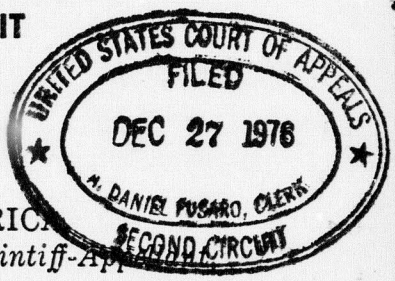
Affidavit

76-6152

To be argued by
FREDERICK P. SCHAFFER

United States Court of Appeals

FOR THE SECOND CIRCUIT



Docket No. 76-6152

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

VARIOUS ARTICLES OF OBSCENE MERCHANDISE,
SCHEDULE NO. 1303,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6152

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

VARIOUS ARTICLES OF OBSCENE MERCHANDISE,
SCHEDULE NO. 1308,
Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLANT

Issues Presented

1. Did the District Court err in holding that the applicable community standards for determining the obscenity of an article seized under 19 U.S.C. § 1305 is that of the community to which it is addressed?

2. Did the District Court err in holding that a claimant of an article seized under 19 U.S.C. § 1305 has the right to have his claim referred to the district of his residence or of the article's destination?

Statement of the Case

This action was commenced on September 24, 1975. The complaint seeks the forfeiture, condemnation, and destruction of obscene articles of merchandise seized by

the United States Customs Service between September 12-18, 1975 pursuant to the provisions of 19 U.S.C. § 1305 (A 4-5a).* On September 24, 1975, a warrant of the arrest of said articles was issued by the Clerk of the Court (A 71), and on October 2, 1975 the United States Marshal executed said warrant and attached said articles (A 73).

Notice of this action was published in the New York Law Journal on October 9, 1975, setting forth the time limits within which any person wishing to contest the forfeiture and destruction of the seized merchandise may file an answer to the complaint and a claim to any of the articles (A 74-75). In addition, on October 10, 1975 a similar notice was mailed to each addressee of the seized articles advising them of the procedure for contesting the forfeiture and destruction of said articles and providing them with a form claim and answer for their use (A 66-70). In response to said notices, fourteen persons submitted claims and answers (A 76-106).

Pursuant to a notice served on all such claimants and filed on November 11, 1975 (A 107-10), a trial was held before the Honorable Marvin E. Frankel on November 18, 1975 (A 130). The only claimant to appear was Bruce A. Long, a resident of Lancaster, Pennsylvania, who claimed a magazine entitled "Stellungen." Mr. Long waived his right to a jury trial (A 133-34). The Government presented one witness, an employee of the United States Customs Service, who described the procedure followed in identifying and seizing items of foreign mail believed to violate 19 U.S.C. § 1305 and who identified the magazine claimed by Mr. Long as having been one of the articles contained in Schedule No. 1303 which was thus seized (A 135-43). Mr. Long testified on his own behalf and introduced into evidence a newspaper article

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* Page citations preceded by the letter "A" refer to the Appendix of plaintiff-appellant.

describing the report of a citizens' committee appointed by the Mayor of Lancaster, Pennsylvania, of which Mr. Long was a member, recommending the toleration of allegedly obscene or pornographic material so long as it is viewed by adults in private and not purveyed to children (A. 148-52, 189-90). Mr. Long also testified that materials similar to the article which he claimed were available for purchase in Lancaster (A. 149).

On November 17, 1975, the Court filed a Partial Default Judgment, which was entered by the Clerk of the Court on November 18, 1975, ordering the forfeiture and destruction of all the seized articles as to which no claims or answers had been filed (A 111-19). On November 19, 1975, the Court filed its proposed partial findings of fact and conclusions of law with respect to the claimed articles (A 120-25). Pursuant thereto, a judgment was filed and entered on November 25, 1975 ordering the return of one article to a claimant at the request of the Government, the forfeiture and destruction of twelve other claimed articles, and reserving decision as to the article claimed by Mr. Long (A 126-29).*

On August 25, 1976 the Court filed an opinion and order dismissing the complaint against the article claimed by Mr. Long and ordering the Government to deliver said article to him (A 163-80). The Court held that the applicable community standard for determining the obscenity of an article seized under 19 U.S.C. § 1305 is that of the community to which it is addressed. The Court went on to reason that a fact finder from outside of that

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* In order to permit a more deliberate consideration of the issues presented by his claim, Mr. Long waived his right to a final decision within 60 days of the filing of the complaint (A 157-59).

community was not competent to apply such standards and in addition that the litigation of claims at the port of entry imposed a disproportionate burden on the vindication of First Amendment rights. The Court therefore concluded that a claimant had the right to have the obscenity of the article claimed by him referred to the district of his residence or of the article's destination and that the Government had the duty to notify potential claimants of that right. Since Mr. Long had not had the opportunity to exercise that right, nor had he received notice of it, the Court held that his claim should be sustained without reaching the merits of the case. In the alternative, the Court found that the Government had failed to sustain its burden of proving the obscenity of the article claimed by Mr. Long within the community standard of Lancaster, Pennsylvania. Accordingly, the Court dismissed the complaint against the article claimed by Mr. Long and ordered the Government to deliver the article to him within 30 days unless a notice of appeal was filed before then. The Government filed its notice of appeal from the District Court's opinion and order on September 23, 1976 (A 181).

Facts

The procedure followed by the United States Customs Service in enforcing the provisions of 19 U.S.C. § 1305 with respect to obscene merchandise imported into the United States by mail through the port of New York is as follows: Customs employees are located at the General Post Office where they screen out and refer to the United States Customs Service office those articles which they suspect contain obscene materials (A 137-38). At the Customs office, those articles are inspected. If an article does not contain obscene materials, it is stamped as having been inspected by Customs and is then released to the Postal Service for delivery (A 141). If, however, it is

determined that an article violates the provisions of 19 U.S.C. § 1305, it is seized and given a seizure number (A 136). Once a week, the Customs Service compiles a schedule of all articles seized during the previous week and sends that schedule to the office of the United States Attorney for the Southern District of New York for the commencement of a forfeiture proceeding (A 185).

The procedure for actions commenced under 19 U.S.C. § 1305 is governed by the Supplemental Rules for Certain Admiralty and Maritime Claims. Pursuant to Rule C thereof, upon the filing of the complaint the clerk of the court issues a warrant for the arrest of the property which is the subject of the action, and said warrant is executed by the United States Marshal (A 71-73). Thereafter, the Marshal causes public notice of the action and arrest to be published (A 74-75). In addition, it is the practice of the Customs Service and the office of the United States Attorney for the Southern District of New York to mail to the addressee of each ariicle listed on the schedule a notice of the action and a form claim and answer (A 66-70).* Claimants are required to file their claim within 10 days after process has been executed, or within such additional time as may be allowed by the Court, and must serve their answer within 20 days after the filing of the claim.** All claims and answers sent to

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* In addition to the above-mentioned notice, the Customs Service, in compliance with the provisions of 19 C.F.R. § 12.40, also mails to each addressee of a seized article a notice of the seizure and a blank assent to forfeiture *before* a schedule is compiled and referred to the United States Attorney for the commencement of a forfeiture proceeding.

** As a practical matter, it is possible that a potential claimant will not receive notice until more than 10 days after the arrest of his article. Consequently, the form notice mailed to him requests that a combined claim and answer be filed within 20 days of the receipt thereof (A 67).

the United States Attorney's office are then filed with the District Court (A 76-106). As to those articles for which no claim or answer has been filed, a partial default judgment is entered (A 111-19). With respect to those articles for which a claim or answer has been filed, a trial is held. In the event that some or all of the claimants fail to appear, their articles are nevertheless submitted to the Court for a determination as to whether they violate 19 U.S.C. § 1305 and as to all claimed articles, a judgment is entered accordingly (A 126-29).

Relevant Statute

19 U.S.C.:

§ 1305. Immoral articles; importation prohibited.

(a) Prohibition of importation.

All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket,

or any advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: *Provided*, That the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: *Provided further*, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for non-commercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of such customs officer. Upon the seizure of such book or matter such customs officer shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation and destruction of the book or matter seized. Upon the adjudication that such book or

matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

ARGUMENT

POINT I

The District Court erred in holding that the applicable community standards for determining the obscenity of an article seized under 19 U.S.C. § 1305 are those of the community to which it is addressed.

The District Court held that the applicable community standards for judging the obscenity of an article seized under § 1305 are those of the community to which it is addressed, rather than those of the district where it is seized. In reaching this conclusion, the Court treated the issue as one involving a choice between the standards of two geographical communities. This approach, however, misinterprets the meaning of the Supreme Court's recent obscenity decisions.

In *Miller* v. *California*, 413 U.S. 15, 30-32 (1973) the Supreme Court rejected the application of a national community standard under the test for determining ob-

scenity,* reasoning that "to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility" and that "[n]othing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." As the opinion makes clear, however, it was not the Court's intention to substitute a local for a national community standard as an element of the plaintiff's proof in an obscenity prosecution or forfeiture action. Rather, the Court's purpose in phrasing its obscenity test in terms of "the average person, applying contemporary community standards" was to direct the fact finder to look beyond his or her own subjective prejudices and predilections and judge the materials at issue by their impact on the proverbial reasonable man living within a community with which the fact finder was familiar.

The Court reaffirmed this meaning of the community standards aspect of the obscenity test in *Hamling* v. *United States* 418 U.S. 87, 104-05 (1974), where it stated:

> Miller rejected the view that the First and Fourteen Amendments require that the proscription of obscenity be based on uniform nationwide

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* That test, as set forth in *Miller* v. *California, supra,* at 24 is as follows:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (Citations omitted.)

standards of what is obscene, describing such standards as "hypothetical and unascertainable," 413 U.S. at 31. *But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula;* the test was stated in terms of the understanding of "the average person, applying contemporary community standards." *Id.*, at 24. When this approach is coupled with the reaffirmation in *Paris Adult Theatre I* v. *Slaton*, 413 U.S., at 56, of the rule that the prosecution need not as a matter of constitutional law produce "expert" witnesses to testify as to the obscenity of the materials, the import of the quoted language from Miller becomes clear. A *juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.* *Stone* v. *New York, C. & St. L.R. Co.*, 344 U.S. 407, 409 (1953); *Schulz* v. *Pennsylvania R. Co.*, 350 U.S. 523, 525-526 (1956). Our holding in Miller that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of constitutional law.

* * * * *

The result of the Miller cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion "the average person, applying contemporary community standards" would reach in a given case . . . . (Emphasis added.)

In short, the test for obscenity is not a geopraphic one calling for a decision as to the appropriate community standards to apply; rather, it is one based on the general view of the community with which the fact finder is most familiar. As the Ninth Circuit stated in *United States* v. *Cutting*, 538 F.2d 835, 841 (9th Cir. 1976):

> The purpose of the "community standards" instruction is not to distinguish attitudes in one area from those in another, but rather to distinguish personal or aberrant views from the generalized view of the community at large . . . .
>
> The fact finder "is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination . . ." *Hamling* v. *United States*, *supra*, 418 U.S. at 104, 94 S. Ct. at 2901. The test tends to result in application of "local" attitudes because of the limited area from which the jury is drawn, but this does not make the obscenity standard any more a geographic one than tests involving "the propensities of a 'reasonable' person in other areas of the law." *Hamling* v. *United States*, *supra*, 418 U.S. at 104-05, 94 S.Ct. at 2901.

Thus, in a case involving a determination as to the obscenity of an article, there is no need to determine which community's standards should be applied and what those standards are. The fact finder's task is simply to apply the standards of the district from which he comes. See *United States* v. *One Reel of 35 MM Color Motion Picture Entitled "Sinderella," Sherpix, Inc.*, 491 F.2d 956 (2d Cir. 1974); *United States* v. *Miscellaneous Pornographic Magazines*, 400 F. Supp. 353 (N.D. Ill. 1975).

The holding in *United States* v. *Elkins*, 396 F. Supp. 314 (C.D. Cal. 1975), relied on by the Court below,

supports rather than conflicts with this principle. In that case, a criminal prosecutor under 18 U.S.C. § 1461 had been brought in the Northern District of Iowa, where the allegedly obscene materials had been received. The District Court for that district transferred the case to the Central District of California, from which the materials had been mailed, despite its ruling that the contemporary community standards of the Northern District of Iowa should apply. The District Court for the Central District of California held that because the indictment had been brought in Iowa, and because the transferor court had already decided that the community standards of that district were the appropriate ones, those standards should be applied by the transferee court. However, since the California court held that fact finders there could not determine the community standards of the Northern District of Iowa, it dismissed the indictment. Although the Northern District of Iowa happened to be the district where the allegedly obscene material was received, the opinion makes clear that the choice of community standards depended not on that fact, but rather on the initiation of the prosecution in Iowa. *Id.* at 317.

The same conclusion was reached in *United States* v. *McManus*, 535 F.2d 460 (8th Cir. 1976), a case involving the reindictment of the same defendants as in *Elkins*. The District Court for the Northern District of Iowa in *McManus* again ordered the transfer of the prosecution to the Central District of California. The Court of Appeals, however, granted a writ of mandamus barring that change of venue in light of the *Elkins* decision. Noting that the prosecution could have been brought in either of those two districts, the Court held that "[s]ince the government chose to bring this indictment in Iowa, only an Iowa jury applying Iowa standards can determine whether this material is obscene." *Id.* at 463.

The Court below therefore erred in treating the community standards as a geographic concept requiring a decision as to the appropriate community standards analogous to a choice of law.* As the discussion above has demonstrated, the fact finder in forfeiture proceedings under 19 U.S.C. § 1305 must apply the community standards of the district in which the proceedings have been brought. The only issue, then, is whether such proceedings may be brought and maintained in the district where the obscene articles are first discovered and seized. As will be demonstrated below, the statute not only permits but requires that result.

POINT II

The District Court erred in requiring the Government to give claimants a choice of forums in proceedings under 19 U.S.C. § 1305.

The District Court also held that the Government was required to give claimants the choice of litigating their claims in the district of their residence or of the destination of the articles, rather than in the district of seizure. In part, this holding was based on what the Court perceived to be the difficulty of having a fact finder in the port of entry apply the community standards of a claimant's residence. In addition, as an independent reason

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* In footnote 10 of its opinion, the Court specifically noted this analogy, claiming that its holding was in harmony with the doctrine in conflicts of law that the controlling law should be taken from the jurisdiction which has the most significant contacts with the allegedly wrongful act. The Court, however, overlooked the purpose of the statute as the most compelling factor in determining the "law" to apply. Where, as here, the statutory purpose is to keep the obscene materials from the stream of domestic commerce, there is ample justification for applying the community standards of the point at which they were first discovered and seized. See Schauer, "Obscenity and the Conflict of Laws," 77 W. Va. L. Rev. 377, 399 (1975).

for requiring a choice of forum, the Court below held that the litigation of the issues in the port of entry places a disproportionate burden upon the vindication of First Amendment rights. The Court recognized, however, that there was doubt as to whether an *in rem* action such as this one may be transferred from one district to another under 28 U.S.C. § 1404(a). It therefore directed the Government to state in the notice to potential claimants that they have a right to have their claims heard in the district in which they reside or to which the article was mailed. Although it is unclear from the opinion, it would seem that the Court was thus ordering the Government, in those cases where the claimants exercised that right, to have the forfeiture proceedings against their articles commenced in the district of their residence or of the destination of the article.

The procedure required by the District Court violates the express provisions of 19 U.S.C. § 1305 and renders impossible compliance with the time limitations established as a constitutional requirement in *United States* v. *Thirty-Seven* (*37*) *Photographs*, 402 U.S. 363 (1971). Furthermore, under the terms of 28 U.S.C. § 1404(a), there can be no change of venue of an *in rem* forfeiture proceedings under 19 U.S.C. § 1305. Thus, in enforcing the proceedings of that statute, the Government must effect seizure of obscene articles at the port of entry and thereafter, the venue of the forfeiture action is fixed there. In mandating that result, 19 U.S.C. § 1305 is a constitutional exercise of Congress' powers to regulate foreign commerce and to establish the jurisdiction and venue of the district courts, despite the incidental burden upon claimants.

A. In Enforcing the Provisions of 19 U.S.C. § 1305, the Government Must Seize Obscene Articles Wherever They Are Found and Must Then Bring Forfeiture Proceedings in the District Where the Seizure Occurred.

The District Court's opinion appears to contemplate that obscene articles would be seized at the port of entry, in this case New York City, but that where potential claimants advise the Customs Service of their desire to litigate in the district of their residence or of the article's destination, the Customs Service would forward such articles to the United States Attorneys for those districts where forfeiture proceedings would then be commenced. Such a procedure, however, would be both illegal and impractical. In the first place, 19 U.S.C. § 1305 provides in relevant part as follows:

> Upon the seizure of such book or matter such customs officer shall transmit information thereof to the district attorney *of the district in which is situated the office at which such seizure has taken place*, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. (Emphasis added.)

The statute thus clearly mandates that forfeiture proceedings be commenced in the district of the seizure.*

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* That requirement seems also to result from the well-established principle that the basis for all jurisdiction *in rem* is the court's possession of the property, for a proceeding *in rem* against specific property is local in nature and must be brought where the property is subject to seizure under the process of the court. *United States* v. *Mack*, 295 U.S. 480, 484 (1935); *Keene* v. *United States*, 9 U.S. 169 (5 Cranch. 304) (1809); *Fettig Canning Co.* v. *Stickle*, 188 F.2d 715, 717-18 (7th Cir. 1951); *Strong* v. *United States*, 46 F.2d 257, 260 (1st Cir. 1931).

Moreover, under the time limitations set forth in *United States* v. *Thirty-Seven (37) Photographs, supra,* 402 U.S. at 367, the United States must initiate forfeiture proceedings within 14 days of the seizure. There is clearly no way the Government can comply with that requirement if, after seizing the articles, the Customs Service must send notices to the potential claimants, await their response, and then, if they request it, refer the matter to the district of their residence or of the article's destination.

These difficulties cannot be avoided simply by requiring the Customs Service to postpone the "seizure" until after the potential claimants have indicated their preference as to venue and their articles have been forwarded to the appropriate United States Attorney's office. Such a requirement would conflict with the clear language of 19 U.S.C. § 1305 that "[u]pon the appearance of any [obscene] book or matter *at any customs office*, the same *shall* be seized . . . ." (Emphasis added.) The Government thus has the obligation under § 1305 to seize obscene articles whereever they are discovered by Customs. Nor would such a postponement of the "seizure" necessarily obviate the problem of meeting the time guidelines. The Supreme Court's opinion in *United States* v. *Thirty-Seven (37) Photographs, supra,* does not define when an article has been "seized" for the purpose of applying its holding. It is the Government's position that the 14 days begin to run on the date article is opened, inspected, and determined to be obscene, rather than the date it is diverted from the Post Office to the Customs Office. Under present practice, this distinction has little significance, since the time lag between these two dates is rarely more than 2 or 3 days, and forfeiture actions are generally brought with 14 days of the earlier date. However, if a substantial amount of time was to elapse between the arrival of an article at a Customs Office in the port of entry and its official "seizure" at a Customs Office in the district of

the claimant's residence or of the article's destination, it would undercut the purpose of the time limitations imposed as a constitutional necessity to avoid delays which would effectively amount to censorship.*

In sum, 19 U.S.C. § 1305 requires that an obscene article be seized where found by Customs and that the forfeiture proceeding be commenced in the district where the seizure has occurred. The unambiguous language of that statute does not permit any choice of forum. The procedure required by the Court below of referring such forfeiture proceedings to the district of the claimants' residence or of the articles' destination, thus, violates the provisions of 19 U.S.C. § 1305 and renders impossible the Government's compliance with its constitutional duty under the decision in *United States* v. *Thirty-Seven (37) Photographs, supra.*

B. Once Commenced, Forfeiture Proceedings Under 19 U.S.C. § 1305 Cannot Be Transferred to Another District.

As the District noted, there is considerable authority for the principle that an *in rem* action may not be transferred under 28 U.S.C. § 1404(a). See *Ladson* v. *Kibble,*

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* It is theoretically possible for the Customs Service to avoid this problem by "flagging" potentially obscene material at the port of entry without diverting it from the mails and then removing it from the Post Office to a Customs Office at its destination. However, not only would this procedure require that all forfeiture proceedings be brought in the district of destination, but it would necessitate the presence of Customs officials in every Post Office of the United States who would be faced with the rather formidable task of finding the "flagged" articles from amid all the mail, both foreign and domestic, coming into the Post Office.

307 F.Supp. 11, 16 (S.D.N.Y. 1969); *Hughes* v. *S. S. Santa Irene*, 209 F.Supp. 440, 442 (S.D.N.Y. 1962). See also *Clinton Foods* v. *United States*, 188 F.2d 289, 292 (4th Cir. 1951); *Jacobs* v. *Tenney*, 316 F.Supp. 151, 169 (D. Del. 1970). The reason for this rule is that 28 U.S.C. § 1404(a) provides for a transfer of an action only "to any other district or division where it might have been brought". All of the above-cited cases held that the time for determining whether an action "might have been brought" in another district is the time when it was in fact brought. Since at that time the *res* can only have been in one district, there are no others to which the action can be transferred.

The only *in rem* case cited by the District Court in which a change of venue was permited under 28 U.S.C. § 1404(a) was *Torres* v. *Steamship Rosario*, 125 F. Supp. 496 (S.D.N.Y. 1954), which was an action on libel *in rem* against a steamship and *in personam* against the steamship to recover for personal injuries. The court there overlooked the issue of whether the action could have been brought in the transferee court at the time it was in fact brought in the transferor court. Moreover, it specifically distinguished those cases (1) where the statute under which they are brought provides that the articles must be condemned in the court where they are found and (2) where the offending articles were in the actual custody of the court for the purpose of assuring their destruction rather than merely as a procedure for ensuring the satisfaction of a money judgment and may be released upon the filing of a bond. The instant case obviously comes within both of these exceptions to the *Rosario* holding. 19 U.S.C. § 1305 requires that the forfeiture proceedings be brought in the district of the seizure, and since at the time they were commenced that was the only district in which they had been seized, there is no other

district to which they can be transferred under 28 U.S.C. § 1404(a). In addition, forfeiture proceedings under § 1305 are purely *in rem* in nature, rather than *quasi in rem*. While the latter actions may be transferred under 28 U.S.C. § 1404(a), *Continental Grain Co.* v. *Barge FBL—585*, 364 U.S. 19 (1960), the former actions may not. *Jacobs* v. *Tenney*, *supra*, 316 F.Supp. at 169.*

Thus, when the provisions of 19 U.S.C. § 1305, together with the constitutional gloss placed on that statute by the Supreme Court in *United States* v. *Thirty-Seven (37) Photographs*, *supra*, are read together with 28 U.S.C. § 1404(a), it becomes clear that obscene articles must be seized wherever found and that *in rem* forfeiture proceedings like the instant one can be brought and maintained only in the district of seizure. If this procedure raises constitutional problems, they must be viewed as inhering in the statute itself and must be confronted directly, rather than avoided by solutions which violate

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* Likewise, the doctrine of *forum non conveniens* is not available to a claimant in an action under 19 U.S.C. § 1305. In the first place, where, as here, the statute requires that the article be seized wherever found and that an action for its forfeiture be brought in the district of seizure, there is no room for judicial discretion to apply the doctrine of *forum non conveniens*. *Cf. United States* v. *National City Lines, Inc.*, 334 U.S. 573 (1948). In addition, the Supreme Court has stated that "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amendable to process; the doctrine furnishes criteria for choice between them". *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506-07 (1947). Once the article has been seized, under the statute it is amenable to process only in that district. Finally, as demonstrated above, there can be no transfer of venue of an *in rem* action under 28 U.S.C. § 1404(a), and the Supreme Court has held that the District Court has less discretion in applying the doctrine of *forum non conveniens* than under § 1404(a). *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955).

the clear mandate of the statute. However, as will be shown below, the fixed venue aspect of 19 U.S.C. § 1305 is a constitutional exercise of Congress' power to regulate foreign commerce and to establish the jurisdiction and venue of the federal courts and does not infringe upon the rights of claimants guaranteed by the First and Fifth Amendments.

C. The Fixed Venue Aspect of 19 U.S.C. § 1305 Is a Constitutional Exercise of Congress' Power to Regulate Foreign Commerce and to Establish the Jurisdiction and Venue of the Federal Courts.

The District Court ordered the Government to provide claimants with the opportunity to have their claims heard in the district of their residence or of their article's destination because of what it perceived to be two problems of constitutional dimension if the right to a transfer of a forfeiture proceeding under 19 U.S.C. § 1305 was not recognized. First, the Court questioned the competency of a fact finder in one district to apply the community standards of another.* See *United States* v. *McManus*, *supra*; *United States* v. *Elkins*, *supra*. As demonstrated above, in Point I, however, the Court erred in holding that the applicable community standards were those of the

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* It should be noted that the procedure required by the District Court does not obviate this problem. According to the Court, the appropriate community standards for judging the obscenity of Mr. Long's article are those of Lancaster, Pennsylvania. However, the United States District Court for the Eastern District of Pennsylvania, to which the forfeiture proceedings would be transferred, is located in Philadelphia and draws its jurors from throughout that district. It is altogether likely that some or all of the fact finders would be as unfamiliar with the community standards of Lancaster as a fact finder from the Southern District of New York.

article's destination rather than of the place of its seizure. Furthermore, none of the decisions upon which the Court below relied suggest that the resulting problem in determining which community standards to apply is one of constitutional dimension. Surely a court is free to conclude that the appropriate community standards are those of the port of entry where the articles were seized and where the forfeiture proceedings must therefore be maintained without violating the rights of claimants under the First and Fifth Amendments. Indeed, the principal flaw in the District Court's opinion is that it reasoned from the choice of standards issue to the forum issue rather than the reverse; thus, by failing to recognize that claims could be heard *only* in the district of the seizure, it overlooked the strongest argument for applying the community standards of that district.

The second constitutional problem perceived by the Court below was the cost and burden upon the vindication of First Amendment rights if claimants are required to litigate in the district of the port of entry. In examining this problem, however, the Court ignored the authority of Congress to require that procedure and failed to cite any cases supporting its assumption that the incidental burden upon claimants outweighed the governmental interests involved.

The Constitution provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations." Art. I, § 8, cl. 3. As the Supreme Court has held repeatedly, Congress thus has "broad, comprehensive powers . . . to present prohibited articles from entry," "plenary power to regulate imports," and " 'complete power . . . over foreign commerce and . . . authority to prohibit the introduction of foreign articles . . . .' " *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 125-26 (1973). (Citations omitted.) Pursuant to these powers Congress enacted Section 305 of the Tariff Act of 1930, 19 U.S.C. § 1305, prohibiting the importation into

this country of obscene materials. Concurrent with this Congressional power to regulate foreign commerce is the right of Congress to determine the consequences of illegal importation of such materials and the place of seizure and the venue of judicial proceedings to effectuate the legislative purpose.

In *Hipolite Co.* v. *United States*, 220 U.S. 45, 58 (1911), a case involving Congress' power to regulate interstate commerce under the Pure Food and Drug Act of 1906, the Supreme Court considered the authority to deal with illegally transported adulterated food once it had reached its destination in a state and had passed out of interstate commerce. In broad language that is certainly equally applicable to Congress' power over foreign commerce, the Court stated:

> The question here is whether articles which are outlaws of commerce may be seized wherever found . . . . The question in the case, therefore is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provisions for their confiscation, and their confiscation or destruction is the special concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles but the use of them, or rather to prevent trade in them, between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation in the original, unbroken packages. The selection of such means is certainly within that breath of discretion which we have said Congress possesses in the execution of

> the powers conferred upon it by the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Lottery Case*, 188 U.S. 321, 325.

Moreover, in criminal cases involving the illegal transportation of goods in interstate commerce, the courts have consistently upheld the power of Congress to fix venue in any district where the offense was committed or through which the transportation was conducted. See, *e.g.*, *Armour Packing Co.* v. *United States*, 209 U.S. 56, 73-77 (1908); *Reed Enterprises* v. *Clark*, 278 F. Supp. 372, 379-380 (D.D.C. 1967); *Hesse* v. *United States*, 187 F. Supp. 375, 377-78 (E.D.N.Y. 1960).*

In view of Congress' plenary power over foreign commerce, it is obvious that Congress' discretion as to how best to effectuate the prohibition of imported articles is at least as broad as that regarding articles in interstate commerce. The underlying purpose of 19 U.S.C. § 1305 is to prevent the entry of obscene articles into the stream of interstate commerce. See *United States* v. *12 200-Ft. Reels of Film*, *supra*, 413 U.S. at 129; *United States* v. *Thirty-Seven (37) Photographs*, *supra*, 402 U.S. at 376. In light of that purpose, it was clearly appropriate for Congress to require the seizure of such articles at any customs office where they appear. Moreover, as a means of enforcing the prohibition of § 1305 in the most expeditious and efficient way possible, Congress could require that forfeiture proceedings be maintained only in the district of seizure. To observe, as the District Court did, that litigation in the district of seizure may be burdensome to those claimants whose residence is remote therefrom, "is to state an objection to the policy of

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* It should be noted that until the adoption of Rule 21 of the Federal Rules Criminal Procedure in 1966, there was no provision for the change of venue in criminal proceedings. Moreover, it now appears that a change of venue may not be obtained pursuant to Rule 21 in prosecutions under 18 U.S.C. § 1461. *United States* v. *McManus*, *supra*.

the law, not to the power of Congress to pass it." *Armour Packing Co.* v. *United States, supra,* 209 U.S. at 77. As the Supreme Court stated regarding the like Congressional power in the area of interstate commerce, "consideration of convenience and hardship, while they may appeal to the legislative branch of the Government, will not prevent Congress from exercising its constitutional power in the management and control of interstate commerce." *Ibid.*

In addition, Congress has broad authority under Article III of the Constitution to limit the jurisdiction of the federal courts. See, *e.g. Yakus* v. *United States,* 321 U.S. 414 (1944); *Lockerty* v. *Phillips,* 319 U.S. 182 (1943); *Lauf* v. *E.G. Shinner & Co.,* 303 U.S. 323 (1938); *Ex parte McCardle,* 74 U.S. (7 Wall.) 506 (1896); *Sheldon* v. *Sill,* 49 U.S. (8 How.) 453 (440) (1850). It is true, of course, that such authority is not unrestricted. See, *e.g., Crowell* v. *Benson,* 285 U.S. 22 (1932); *United States* v. *Klein,* 80 U.S. (13 Wall.) 128 (1872). However, while the exact parameters of these restrictions may be unsettled, see generally Hart and Wechsler, The Federal Courts and the Federal System, pp. 309 *et seq.,* (2d ed. 1973), the complete authority of Congress to place exclusive jurisdiction or venue in a particular lower federal court with respect to an area of civil litigation is certain. This principle has been most clearly stated by Professor Hart in his celebrated "Dialogue" where he posed and answered the following question:

> Q. Passing to another question, does the Constitution give people any right to proceed or be proceeded against in one inferior federal constitutional court rather than another?
>
> A. As to civil plaintiffs, no. Congress has plenary power to distribute jurisdiction among such inferior federal constitutional courts as it choses to establish.

> As to civil defendants, the answer almost certainly is also no. To be sure, doubts are occasionally suggested about the validity in all circumstances of nation-wide service of process, but they don't seem to me to have much substance.

Hart and Wechler, *supra*, at 331.

The restriction of litigation as to a category of civil cases to a single court is hardly unusual. For example, the Court of Claims has exclusive jurisdiction over cases against the United States for monetary damages not sounding in tort where the amount in controversy exceeds $10,000. Likewise, the Customs Court has exclusive jurisdiction over certain actions brought under the Tariff Act of 1930. 28 U.S.C. § 1582. Such provisions are unquestionably a valid exercise of Congress' plenary power to define the jurisdiction and venue of the federal courts. The fact that their application may inconvenience some parties is not a problem of constitutional dimension.*

Furthermore, the fact that the litigation of claims under § 1305 may involve issues of constitutional rights does not alter this conclusion. For eighty years prior to the amendment of 28 U.S.C. § 1391(b) in 1966, the venue of federal question cases was limited to the district where all defendants resided. Similarly, before the addition of 28 U.S.C. § 1361 in 1962, mandamus actions against federal officials had to be brought in the District of Columbia. In all of these circumstances, restrictive jurisdictional and venue provisions placed a significant

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* The Court of Claims sits in Washington, D.C. 28 U.S.C. § 174. The Customs Court is located in New York City. 28 U.S.C. § 251. Although both courts are authorized to hear cases elsewhere, that is a matter left to their discretion. 28 U.S.C. §§ 175 and 256. See *Shannon Luminous Material Co.* v. *United States*, 349 F. Supp. 1000 (Cust. Ct. 1972).

burden upon challenges to governmental actions involving constitutional rights. Nevertheless, it would have been a rather dubious contention that the challenged actions were for that reason unlawful or that the easing of these restrictions was constitutionally required.

The contention that the constitutionality of forfeiture proceedings under 19 U.S.C. § 1305 is in doubt because of the burden upon a claimant in having to litigate his claim in the district of seizure is similarly dubious. The case upon which the District Court primarily relied, *Freedman* v. *Maryland*, 380 U.S. 51 (1966), is of little support. That case concerned the danger to First Amendment rights if an initial restraint becomes a form of censorship as a result of a delay in judicial review. That problem was resolved in the context of seizures of allegedly obscene material under 19 U.S.C. § 1305 by the time limitations established in *United States* v. *Thirty-Seven Photographs*, *supra*. Thus, in the instant case there can be no issue concerning "censorship" or "prior restraints". Rather, the question is whether in a judicial forfeiture proceeding a claimant can be required to litigate his claim in the district of the seizure before a court which has unquestionable jurisdiction over the *res* and the subject matter of the action. In light of Congress' power to regulate foreign commerce and to define the jurisdiction and venue of the federal courts, the answer must surely be in the affirmative.

CONCLUSION

For the foregoing reasons, the order of the District Court dismissing the complaint as to the article claimed by Mr. Long should be reversed and the case remanded for a determination of the obscenity of that article under the contemporary community standards of the Southern District of New York.

Dated: New York, New York
December 27, 176

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

FREDERICK P. SCHAFFER, being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 27th day of December 1976 he served 2 copies of the within Appellant's Brief and one copy of the Joint Appendix

by placing the same in a properly postpaid franked envelope addressed:

American Civil Liberties Union
22 East 40th Street
New York, New York

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Frederick P. Schaffer

Sworn to before me this

27th day of December, 1976

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978